

2003

# The Quicksands of Originalism: Interpreting Minnesota's Constitutional Past

Douglas A. Hedin

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## Recommended Citation

Hedin, Douglas A. (2003) "The Quicksands of Originalism: Interpreting Minnesota's Constitutional Past," *William Mitchell Law Review*: Vol. 30: Iss. 1, Article 14.

Available at: <http://open.mitchellhamline.edu/wmlr/vol30/iss1/14>

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## THE QUICKSANDS OF ORIGINALISM: INTERPRETING MINNESOTA'S CONSTITUTIONAL PAST

Douglas A. Hedin<sup>†</sup>

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### I. PROFESSOR PANNIER'S PROVOCATION

There are several varieties of the "originalist" school of constitutional thought, but all subscribe in one degree or another to the belief that a constitutional clause should be interpreted according to its original meaning or the original intent of its authors. That original understanding or intent can be discerned from the text of the clause, the history of its drafting and ratification and, sometimes, early practices and court decisions interpreting that clause. It rightly has been called a "grand theory" because it is simple and clear, explains so much, and it has the almost irresistible attraction of being anchored firmly in history, a past illuminated by the writings and speeches of heroic figures—

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the “founding fathers.”<sup>1</sup>

Like frontier settlers in the novels of O. E. Rølvaag, lawyers, legal scholars and jurists who attempt to interpret Minnesota’s Constitution on the basis of its original understanding or the framers’ intent encounter unexpected hardships, hazards, and deprivations. This article explores practical reasons why a strict originalist interpretation of the Minnesota Constitution has never taken hold, and probably never will. It does not address the worthiness of the originalist school of adjudication at all. It is both provoked and inspired by an essay published in these pages a year ago by Professor Russell Pannier on the decision of the Minnesota Supreme Court in the case of *Abraham v. Hennepin County*.<sup>2</sup> There, the court held that an employee claiming retaliatory discharge under the state “whistleblower act” had a right to a jury trial under Article 1, section 4 of the Minnesota Constitution.<sup>3</sup> Professor Pannier concluded that the *Abraham* court attempted to ride “originalist” and “non-originalist” horses in the same race; not mincing words, he found the court’s reasoning “incoherent” and “internally inconsistent.”<sup>4</sup> But there is another view of *Abraham*, that with it, the court boldly built a contemporary structure for the analysis of the jury right that is faithful to the democratic order and harmonious with this state’s constitutional past.

## II. THE DUAL CONSTITUTIONAL CONVENTIONS

The starting point for any originalist is the constitution and the records of the deliberations of the founders.<sup>5</sup> Looking back at

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1. DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 13 (2002).

2. 639 N.W.2d 342 (Minn. 2002); Russell Pannier, *Essay: Abraham’s Theory of Constitutional Interpretation*, 29 WM. MITCHELL L. REV. 265 (2002).

3. *Abraham*, 639 N.W.2d at 348.

4. Pannier, *supra* note 2, at 285-86.

5. Pannier summarizes the “originalist” conception of a constitution as: . . . (1) a set of legal principles, which are (2) expressed in terms of particular sentences, that, in turn, are (3) contained in a particular historical document, and (4) whose semantical meanings are functions of the particular historical context in which that document was adopted, including at the very least the particular intentions of those responsible for choosing those particular sentences to express those intentions.

*Id.* at 283 (citing ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 17-18 (2d ed. 2002)). For a description of the “original meaning” school of thought, see ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (1997) (“What I look for in the Constitution is precisely what I

the formation of Minnesota's constitution, we see somewhat of a mess, to put it kindly. The constitution Minnesota had when it became a state on May 11, 1858, was a compromise document resulting from two bitterly divided conventions. Convened on July 13, 1857, in St. Paul, the constitutional convention split along party lines into separate "wings" so fast that one historian concluded, "[it] did not at any time have a real meeting as a whole."<sup>6</sup> According to Harlan P. Hall, a newspaper reporter who was covering the proceedings, tensions were so high that "[an] open outbreak between the respective bodies was anticipated, and many members of both bodies went armed, to be prepared for any emergency."<sup>7</sup> The dual conventions almost became dueling conventions. Professor William Anderson, the foremost historian of the constitution, described the charter's birth:

[T]he original state constitution was not drawn up in that calm and deliberate manner which is essential to a good result. The conventions themselves, although stormy enough, spent some weeks in constitutional discussions, but the constitution did not result directly from their debates. Instead, the raw materials which they had produced were turned over to a separate conference committee of ten members. This body met in secret and kept no record of its proceedings. To a considerable extent it chose sections which had emanated from the Democratic wing, and to a less extent those which the Republicans had produced, but much of the document finally put forth was different from what either wing had adopted. The published debates of the two wings of the convention are, therefore, of little value in explaining the provisions and phraseology of the constitution, and they have been only infrequently cited. The real constitution was somewhat hastily pieced together, in a little over one week, by the conference committee, and was then passed by both wings within twenty-four hours, without change and almost without debate. As one member put it, "This is a dose that has got to go down, and we might as well shut our eyes and open our mouth and take it." And so it

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look for in a statute: the original meaning of the text, not what the original draftsmen intended.").

6. William Anderson, *The Constitution of Minnesota*, 5 MINN. L. REV. 407, 420 (1921); see also WILLIAM WATTS FOLWELL, 1 HISTORY OF MINNESOTA 398-400 (1921).

7. HARLAN P. HALL, H. P. HALL'S OBSERVATIONS 20 (4th ed. 1905).

was done.<sup>8</sup>

At the election on October 13, 1858, eligible voters ratified the constitution by a wide margin, 30,055 to 571.<sup>9</sup> Admitted in 1858, Minnesota was the thirty-second state in the Union.

Minnesota's constitutional convention was so dysfunctional that the state supreme court has been reluctant to rest its rulings on the deliberations of the delegates. In 1858 and again in 1861, Justice Charles Flandrau referred to both wings and their presiding officers by name.<sup>10</sup> In 1864, the propriety of relying on the debates was endorsed by Chief Justice LaFayette Emmett, but the following year, his successor, Chief Justice Thomas Wilson, a member of the Republican wing, declared that the debates were not proper authority.<sup>11</sup> In 1892, Justice William Mitchell mentioned the Democratic debates when interpreting Article 10, section 3.<sup>12</sup> In 1908, Justice Charles Lewis mentioned "the constitutional debates" while construing Article 4, section 5, but did not name either wing of the convention.<sup>13</sup> In recent years, the supreme court has mentioned the debates as historical background, tacitly acknowledging the futility of ascertaining from them the true intentions of the delegates. To illustrate, in 1993, the court rejected a challenge to the school system under Article 13, which guarantees "a general and uniform system of public schools."<sup>14</sup> It quoted proposals on public education from both the Republican and Democratic caucuses, but noted "[n]either of the [two] proposed drafts at the constitutional convention included the present language 'general and uniform.'"<sup>15</sup> As suggested by

8. William Anderson, *The Need for Constitutional Revision in Minnesota*, 11 MINN. L. REV. 189, 191 (1927). Two constitutions emerged from the process, a Democratic version, reprinted in 1 MINN. STAT. ANN. 161-197 (1976), and a Republican version, reprinted in 1 MINN. STAT. ANN. 199-239 (1976).

9. Anderson, *supra* note 6, at 426. One reason for the lopsided vote was that the ballots were designed to bar votes against statehood. *Id.* at 426-27.

10. *Roos v. State ex rel. Swenson*, 6 Minn. 428, 434-35, 6 Gil. 291, 294 (1861); *Bd. of Supervisors of Ramsey County v. Heenan*, 2 Minn. 330, 336, 2 Gil. 281, 287 (1858).

11. *Taylor v. Taylor*, 10 Minn. 107, 108, 10 Gil. 81, 99 (1865) (Wilson, C.J.); *Crowell v. Lambert*, 9 Minn. 283, 286, 2 Gil. 267, 276-77 (1864) (Emmett, C.J.).

12. *Willis v. St. Paul Sanitation Co.*, 48 Minn. 140, 154, 50 N.W. 1110, 1113 (1892).

13. *State v. Scott*, 105 Minn. 513, 516, 117 N.W. 1044, 1045 (1908) (Lewis, J.).

14. *Skeen v. State*, 505 N.W.2d 299, 315 (Minn. 1993) (citing MINN. CONST. art. 13, § 1); see also *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989) (citing the constitutional debates as background, not as a sign of the framers' intent).

15. *Skeen*, 505 N.W.2d at 309.

Professor Anderson, those critical words came from the secret conference committee that kept no records (which raises the question why, if they wanted their intentions to control future generations of jurists, they did not memorialize their deliberations).

In Minnesota, therefore, the reliability of one pillar of the originalist's structure—the constitutional debates—is questionable. But there remain the territorial records. After all, Minnesota had been a territory with an established court system and set of laws a dozen years before statehood; and it was in *Abraham* that the supreme court stated that Article 1, section 4 “is intended to continue, unimpaired and inviolate, the right to trial by jury as it existed in the Territory of Minnesota when the constitution was adopted in 1857.”<sup>16</sup> To Professor Pannier, this suggested “the invocation of an originalist method.”<sup>17</sup>

### III. MINNESOTA'S TERRITORIAL LAW: “A MESS OF INCONGRUOUS IMPERFECTION”

For the originalist, territorial records are legitimate sources of original intent or meaning because the transitional “schedule” following Article 16 of Minnesota's 1857 constitution decreed that “all laws now in force in the territory of Minnesota” shall remain in force.<sup>18</sup> Moreover, individual justices have referred to territorial law when construing the 1857 constitution.<sup>19</sup> As in the case of the

16. *Abraham v. County of Hennepin*, 639 N.W.2d 342, 348 (Minn. 2002) (citing *Olson v. Synergistic Technologies Bus. Sys., Inc.*, 628 N.W.2d 142, 148 (Minn. 2001) (Anderson, Russell, J., concurring) and *Whallon v. Bancroft*, 4 Minn. 109, 111, 4 Gil. 70, 74 (1860)).

17. Pannier, *supra* note 2, at 282.

18. Section 2 of the schedule provides, “All laws now in force in the territory of Minnesota not repugnant to this constitution shall remain in force until they expire by their own limitation or be altered or repealed by the legislature.” According to Judge Haycraft, the “so-called schedule to the constitution could hardly be said to be a part of that instrument. There was nothing permanent in it. The object seemed to have been to provide for the transfer of the territorial government to the state government.” Julius E. Haycraft, *Territorial Existence and Constitutional Statehood of Minnesota*, 1 MINN. STAT. ANN. 145, 157 (1946). The schedule was repealed by Article 16, section 13 of the 1974 Restructuring of the constitution. Its transitional purpose was cited frequently by the supreme court in cases decided years after statehood, even as late as 1916, in *City of St. Paul v. Oakland Cemetery Ass'n*, 134 Minn. 441, 445, 159 N.W. 962, 963 (1916), where it held that public burial grounds are exempt from taxation.

19. See, e.g., *State v. Bishop Seabury Mission*, 90 Minn. 92, 96-97, 95 N.W. 882, 883 (1903) (Brown, J.); *Bd. of Supervisors of Ramsey County v. Heenan*, 2 Minn.

constitutional debates, however, the originalist who seeks to find “original intent or meaning” in the laws of the Minnesota territory, whether statutory or common, encounters almost insurmountable historical hazards and deprivations. For good reason, Associate Justice David Cooper of the territorial supreme court, in an address to newly admitted lawyers in August 1849, called the state of territorial law “a mess of incongruous imperfection.”<sup>20</sup> In their legal history of territorial courts and law, Professor William Wirt Blume and Elizabeth Gasper Brown wrote, “[d]ue to the practice of creating new territories out of old ones, law developed in one territory was in many instances transmitted to another, and sometimes to several territories in sequence.”<sup>21</sup> Minnesota was the receptacle of the laws of many other jurisdictions. The Minnesota Territory was created from the Wisconsin Territory in 1849 by the Organic Act.<sup>22</sup> Wisconsin had been taken from the Michigan Territory in 1836, and the laws of the latter applied to the former.<sup>23</sup> The Michigan Territory in turn was separated from the Indiana Territory in 1805, and the Indiana Territory was carved from the

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330, 333, 2 Gil. 281, 284 (1858) (Flandrau, J., dissenting) (“I will examine whether the framers of the constitution intended the provisions of sections 13, 20 and 27 of art. 4, or any of them above cited, to be merely directory upon the legislature. This investigation will lead me to a review of the legislation as practised [sic] previously in the territory. Such changes as are instituted by the constitution, and departures from established practices when we were acting without any constitution but that of the United States and the Organic Act, must be considered as providing for some deficiency or intended to check some abuse which existed previously in the legislative department.”).

20. HIRAM F. STEVENS, *Judge David Cooper's Celebrated Charge to the Grand Jury, in 1 HISTORY OF THE BENCH AND BAR OF MINNESOTA* 20, 28-29 (1904). Judge Cooper was quite candid:

Coming to the bench, gentlemen, young as I am—the youngest superior judge in the union—and under the circumstances that I do, I shall necessarily need much indulgence at your hands. The statutory provisions of the Territory of Wisconsin, until within a few weeks, I had never seen; and, such a mess of incongruous imperfections as they are, it cannot be expected that I am very familiar with them.

*Id.* at 28-29. Cooper was then only twenty-eight years old when he spoke to newly admitted lawyers following his first charge to a grand jury in Mendota in August 1849. *Id.* at 29.

21. William Wirt Blume & Elizabeth Gasper Brown, *Territorial Courts and Law: Unifying Factors in the Development of American Legal Institutions II*, 61 MICH. L. REV. 467, 468-69 (1963).

22. Organic Act, ch. 121, § 12, 9 STAT. 403 (1849), reprinted in 1 MINN. STAT. xxxvii (2002).

23. Blume & Brown, *supra* note 21, at 495 (The Wisconsin Organic Act of 1836 “provided that ‘the existing laws of the Territory of Michigan’ should be extended over Wisconsin until altered or repealed” (citations omitted)).

Northwest Territory in 1800. The Northwest Territory was established by The Northwest Ordinance of 1787, which contained a rudimentary bill of rights, including a guarantee of trial by jury.<sup>24</sup>

Wording from the Ordinance of 1787 reemerged in the Preamble to the Minnesota Constitution of 1857 and several articles.<sup>25</sup> Professor Blume and Ms. Brown deduced that the federal act creating Wisconsin “incorporated by express reference the bill of rights (Articles) of the Ordinance” and the “Iowa and Minnesota acts (1838 and 1849) indirectly incorporated the bill of rights by referring to Wisconsin,” but in a recent study of the state constitution, Professor Mary Jane Morrison concludes that “the Northwest Ordinance is an essential part of the state’s constitutional history, although it is not part of the Minnesota law.”<sup>26</sup> In any event, for the originalist, the Ordinance of 1787 is part of Minnesota’s constitutional patrimony. On rare occasions, the Minnesota Supreme Court has referred to the Ordinance of 1787 for guidance.<sup>27</sup>

The Organic Act applied Wisconsin law to the new Minnesota Territory.<sup>28</sup> When relying upon territorial law after statehood, the Minnesota Supreme Court acknowledged the authoritative nature of Wisconsin law. In an 1877 case, Justice John Berry wrote:

24. Northwest Ordinance of 1787, U.S. REV. STATS. (1878), *reprinted in* 1 MINN. STAT. ANN. 39-45 (1976). Article II of the Ordinance provides in part, “[t]he inhabitants of the said territory shall always be entitled to the benefits of the writs of *habeas corpus*, and of the trial by jury.” *Id.* at xxxv. The Northwest Territory was established by act of Congress on Aug. 7, 1789. 1 STAT. 50 (1789), *reprinted in* 1 MINN. STAT. xxxiii (2002). In 1800, the Indiana Territory was created from the Northwest Territory by Congress. 2 STAT. 58 (1800), *reprinted in* 1 MINN. STAT. ANN. 48-49 (1976). *See generally* Charles Loring, *Historical Review of the Judicial System of Minnesota*, 27 MINN. STAT. ANN. 53, 58 (1947).

25. MARY JANE MORRISON, *THE MINNESOTA STATE CONSTITUTION: A REFERENCE GUIDE* 3-5 (2002) (describing how wording from the Ordinance appeared in the Preamble and several articles of the 1857 Minnesota Constitution).

26. Blume & Brown, *supra* note 21, at 470; MORRISON, *supra* note 25, at 3.

27. *See, e.g.*, *State v. Bishop Seabury Mission*, 90 Minn. 92, 96, 95 N.W. 882, 883 (1903); *State v. Hershberger (II)*, 462 N.W.2d 393, 399 n.3 (Minn. 1990) (Simonett, J., concurring).

28. Section 12 of The Organic Act provided that:

the laws in force in the Territory of Wisconsin at the date of the admission of the State of Wisconsin shall continue to be valid and operative therein, so far as the same be not incompatible with the provisions of this act, subject, nevertheless, to be altered, modified, or repealed, by the governor and legislative assembly of the said Territory of Minnesota;

ch. 121, § 12, 9 STAT. 403, 407 (1849), *reprinted in* 1 MINN. STAT. xxxvii, xl (2002). Wisconsin became a state in 1848.



The main question presented by this case is whether the common-law right of a landlord to distrain for rent in arrear, exists in this state. Section 12 of the organic act of the territory of Minnesota (passed March 3, 1849,) provides that “the laws in force in the territory of Wisconsin, at the date of the admission of the state of Wisconsin, (May 29, 1848,) shall continue to be valid and operative therein,” (i.e., in the territory of Minnesota,) “so far as the same be not incompatible with the provisions of this act, subject nevertheless to be altered, modified or repealed by the governor and legislative assembly.” The constitution of this state, (adopted in 1857,) in section 2, of the schedule, declares that “all laws now in force in the territory of Minnesota, not repugnant to this constitution, shall remain in force until they expire by their own limitation, or be altered or repealed by the legislature.”

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[O]ur conclusion is, that, as at the date of the admission of the state of Wisconsin into the union, the landlord’s common-law right of distress for rent in arrear was in force in the territory of Wisconsin, and as such right of distress is not incompatible with the provisions of our organic act, nor repugnant to the constitution of this state, and has not been altered or repealed by our territorial or state legislature, it is in force in this state.<sup>29</sup>

Diligent originalists tracing the lineage of Minnesota’s territorial law may find themselves across the border in Wisconsin, but that trek is not without impediments. Shortly after becoming a territory, the Minnesota legislature passed a comprehensive statute, the Revised Statutes of 1851, consolidating and rearranging existing laws, omitting others, and providing that “all acts and parts of acts, unless heretofore repealed, whether enacted by the legislature assembly of the late territory of Wisconsin, or the territory of Minnesota, shall be repealed except as hereinafter provided.”<sup>30</sup> It would appear that with one stroke, the Minnesota legislature relegated its Wisconsin heritage to history. But that was not so. The Revised Statutes were patterned after Wisconsin legislation passed in 1849, and the New York code on pleading and practice.<sup>31</sup> Even after statehood, the Minnesota Supreme Court

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29. Dutcher v. Culver, 24 Minn. 585, 587-90 (1877).

30. 1851 Minn. Laws ch. 137 § 1.

31. Stefan A. Riesenfeld, *Law-Making and Legislative Precedent in American Legal*

had to contend with lawyers who argued that Wisconsin laws affecting their clients had not been repealed by the 1851 act.<sup>32</sup>

For the originalist, early court rulings may be indicia of original meaning or intent, but legal authorities were not always available to the supreme court in those days, making even the justices themselves uneasy with the process. In *Mason v. Callender*, an important 1858 case differentiating interest from a penalty in a promissory note, Justice Flandrau, who had served on the Territorial Supreme Court, rejected an argument by one party that Wisconsin law on interest applied, while acknowledging, "I have been unable to find the laws of Wisconsin."<sup>33</sup> In dissent, Chief Justice Emmett did not fault the majority because he faced a similar quandary; distinguishing a California decision, he admitted, "I have not been able to secure a copy of the California statutes."<sup>34</sup> Justice Atwater, a member of the first state supreme court, described one reason for his colleagues' plight:

The early sessions of the first Supreme Court were held in a room in the north wing of the old Capitol Building. There was at that time no law library for the use of the judges, and we were necessarily much hampered in our work by the lack of that facility. Often we would have brief reference to decisions which might be of controlling weight upon a case under consideration, but it was impossible for us to obtain any full report of these decisions. Many cases came before us, especially in real estate and railroad law, which were of first impression, and we were obliged to struggle with the questions presented with practically no aid from the text-books or prior precedents.<sup>35</sup>

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*History*, 33 MINN. L. REV. 103, 142 (1949) ("The Wisconsin Revised Laws of 1849 finally served as foundation for the Revised Laws of the Territory of Minnesota of 1851. The committee in charge of the draft had to complete their work in sixty days. Consequently they made very few actual changes. In some instances they preferred to retain the law as it had been inherited from the Territory of Wisconsin rather than adopt the form which the State of Wisconsin had enacted . . . . The most significant digression from the Wisconsin statute was the incorporation of large portions of the draft of the New York Commissioners on Practice and Pleadings which had been published in 1850." (citations omitted)).

32. See, e.g., *Mason v. Callender*, Flint & Co., 2 Minn 350, 372, 2 Gil. 302, 324-25 (1858).

33. *Id.* at 372, 2 Gil. at 325.

34. *Id.* at 379, 2 Gil. at 333.

35. Letter from Isaac T. Atwater to be read at the Proceedings in Memory of

These primary authorities are available to a conscientious originalist, who in an anomaly would know more about legal treatises and the laws of other states in that era than did the justices who served at that time.

If a contemporary originalist may have greater access to some of the statutes and court rulings from sister states than a territorial justice, that jurist would have greater knowledge of the rulings of his court than a modern scholar ever could because those decisions were not always written, and those that were not written have been lost to history. As Chief Justice Sheran and now-District Court Judge Baland wrote, “[a]ll told, the territorial supreme court considered 161 filed matters, of which 119 were decided by opinion, 58 of them written.”<sup>36</sup> Noting *Abraham’s* reliance on an

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Associate Justice Flandrau, in 89 Minn. xxi, xxix (1904). The lack of a more complete library is one reason why, according to one study, no less than 26% of all opinions of the supreme court in its first eight years—from 1858 to 1865—“were without any citations or references to commentaries, texts, dictionaries, or judicial opinions of any court.” Nahman Schochet, Comment, *Minnesota’s First State Supreme Court (1858-1865), and the Introduction of the Code of Civil Procedure*, 11 MINN. L. REV. 93, 109 (1927).

36. Robert J. Sheran & Timothy J. Baland, *The Law, Courts, and Lawyers in the Frontier Days of Minnesota: An Informal Legal History of the Years 1835 to 1865*, 2 WM. MITCHELL L. REV. 1, 30 (1976) (citing R. GUNDERSON, HISTORY OF THE MINNESOTA SUPREME COURT, § V, at 2-3 (1937)). In 1861, Justice Flandrau relied upon a decision of a territorial court, but admitted, “I am unable, however, to find any record or report of the decision, and am not certain that the question was passed upon by the court of last resort.” *Roos v. State ex rel. Swenson*, 6 Minn. 428, 434, 6 Gil. 291, 293 (1861). There is one other unusual aspect of the territorial supreme court which may lead an originalist to have second thoughts about relying too heavily upon its rulings. A territorial judge served as a trial judge, and when an appeal was taken, he joined the other two judges on the appellate court to review the case. In *Desnoyer v. L’Hereux*, 1 Minn. 17, 1 Gil. 1 (1851), Judge Goodrich acted as trial judge, served on the supreme court after the case was appealed, and dissented when it was reversed because he had given faulty jury instructions. Judge Flandrau reflected upon this process in an address to the Minnesota Historical Society in 1896:

When the territory was organized, its judicial power was vested in a Supreme Court, District Courts, Probate Courts, and Justices of the Peace. Three judges were allowed it, a Chief Justice and two associates. The judges held the trial courts individually, and assembled *in banc* to sit as a Supreme Court of Appeals. This allowed a judge to sit in review of his own decision, which is not to be commended, but did not produce any noticeable disturbance in the administration of justice that I remember.

Charles E. Flandrau, *Lawyers and Courts of Minnesota Prior to and During Its Territorial Period*, 8 MINNESOTA HISTORICAL SOCIETY COLLECTIONS 89, 98 (1898). See also JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 101 (1950) (noting that some of the Northwest Territories followed the King’s Bench system

1861 decision in a common law breach of employment contract action, Professor Pannier suggests that the court's discussion of the evolution of the cause of action for wrongful discharge would have been strengthened if it had tracked down a ruling issued at least by 1857, the "legally relevant year," on a statutory suit for wrongful discharge seeking money damages.<sup>37</sup> Though unlikely, there may have been such a ruling, but it was not published.<sup>38</sup>

As interpreted before the Reconstruction Amendments, the federal Bill of Rights applied only to the federal government, not the states.<sup>39</sup> But it also applied to territories which, by definition, were not states. Minnesota's Organic Act imposed not only Wisconsin law but also the United States Constitution on the new territory.<sup>40</sup> The Minnesota Supreme Court, therefore, applied the standards of the Seventh Amendment to the federal Constitution when it judged territorial law on juries.<sup>41</sup> In 1872, the supreme

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in which judges often heard questions of law that arose out of cases they had previously heard).

37. Pannier, *supra* note 2, at 274.

38. In fact there was (almost) such a ruling, but it was not cited in *Abraham* either because of its obscurity or because it did not fit the court's historiography—it was not a case decided by the territorial supreme court, rather one instigated by one of its members. Aaron Goodrich was appointed by President Zachary Taylor on March 19, 1849, to be Chief Justice of the Supreme Court of the Territory of Minnesota for a term of four years. Almost immediately citizens charging that Goodrich was temperamentally unfit for office began a campaign for his removal. See Robert C. Voight, *Aaron Goodrich: Stormy Petrel of the Territorial Bench*, 39 MINN. HIST. 141, 145-51 (1964). On October 22, 1851, President Fillmore, who had succeeded to the presidency in 1850 after the death of Taylor, removed Goodrich and replaced him with Jerome Fuller (who was never confirmed). Claiming that the President had exceeded his statutory authority, Goodrich challenged his termination by bringing a mandamus action in the Circuit Court for the District of Columbia seeking \$2343, which was his salary for the balance of his term. United States *ex rel.* Goodrich v. Guthrie, 58 U.S. (17 How.) 284, 302 (1855) (McLean, J., dissenting). The United States Supreme Court, per Justice Daniels, affirmed the denial of Goodrich's wrongful termination claim on the ground that a writ of mandamus was not an appropriate remedy. *Id.* at 320. James Guthrie, the nominal defendant, was Secretary of the Treasury. See generally 5 Carl B. Swisher, *The Taney Period, 1836-1864*, in OLIVER WENDELL HOLMES DEVISE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 169-71 (1974).

39. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 242, 250 (1833).

40. Act of Mar. 3, 1849, ch. 121, § 6, 9 STAT. 403, 405 (1849), *reprinted in* 1 MINN. STAT. xxxvii (2002) ("And be it further enacted, [t]hat the legislative power of the Territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this act . . .").

41. See *Whallon v. Bancroft*, 4 Minn. 109, 115, 4 Gil. 70, 76 (1860) ("The only restriction that operated upon the territorial legislature, in regard to the right of trial by jury, was that contained in article seven of the amendments to the constitution of the United States, proposed in 1789 . . . . This clause in the

court faced a challenge to a state law permitting trial judges to refer cases to a referee for binding judgment.<sup>42</sup> The court declared the state law unconstitutional because it denied a party a jury trial—in violation of the Seventh Amendment. The “referral” law, though passed after statehood, was “first found” in the Territorial Revised Statutes of 1851, but that in turn had been “taken” from the law of the state of New York, to which the Seventh Amendment did not apply.<sup>43</sup> As explained by Chief Justice Christopher Ripley:

There was, however, this vital difference between New York and Minnesota, at the time of the adoption of their respective constitutions, viz.: that in Minnesota the constitution of the United States was then the supreme law of the territory.

The organic act provides that the legislative power of the territory shall extend to all rightful subjects of legislation, consistent with the constitution of the United States and the provisions of this act. *Section 6.*

....

If the particular provision of the [1851] Revised Statutes now under consideration was not consistent with the constitution of the United States, it was, therefore, void at the time of the adoption of the constitution of Minnesota, and, also, necessarily void by the latter, as we have already seen.

....

It would necessarily follow, therefore, that the provision of the *Rev. Stat.*, *ch.* 71, § 50, that where the parties to a civil action did not consent, the court might order a reference when the trial of an issue of fact required the examination of a long account on either side, to referees to hear and decide the whole issue, was repugnant to the

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constitution of the United States was in full force within the territory, both upon the legislature and the courts, because they both acted under the sole authority of the United States.” (citation omitted)). Professor Pannier writes that in *Abraham* the Minnesota Supreme Court “obviously presupposed the existence of only two possible sources for a right to a jury trial under Minnesota law: State statutes, on the one hand, and the State constitution, on the other.” Pannier, *supra* note 2, at 271. This is a fair reading of the opinion, but for the originalist, the Seventh Amendment to the federal constitution was the ultimate “source” of the jury right at the time of the adoption of the constitution in 1857.

42. *St. Paul & Sioux City R.R. Co. v. Gardner*, 19 Minn. 132, 134, 19 Gil. 99, 100 (1872).

43. *Id.* at 138-39, 19 Gil. at 103-04.

[C]onstitution of the United States.<sup>44</sup>

Most of the federal Bill of Rights has been applied piecemeal to the states through the Fourteenth Amendment; today, the Seventh Amendment is one of the few that does not.<sup>45</sup> Thus, in a historical curiosity, the jury guarantee of the Seventh Amendment applied to Minnesota before statehood, but not afterward—unless, that is, Minnesota courts maintained complete fidelity to the supposed original purpose of Article 1, section 4, which was to continue the right to trial by jury as it existed in the territory.

For the originalist, there can never be too much history—by abiding by historical proof of original intent or meaning, contemporary judges are constrained from reading their personal views and values into the constitution. Professor Blume and Ms. Browne, meticulous legal historians of territorial law, reached conclusions that, in one respect at least, are not compatible with originalism:

Looking beyond particular developments such as mining and water laws made by trespassers to regulate the affairs of trespassers, and detailed modifications of rules originally English to suit frontier conditions, we find two general attitudes and resultant influences attributable to frontier life: (1) A strong desire to have all statute law published locally so that reliance on laws not available on the frontier would be unnecessary—codes were welcome; (2) A lack of “superstitious respect” for old laws and legal institutions; in other words, a readiness to make changes to suit new conditions.<sup>46</sup>

That “readiness” to adapt the law to the demands of life on the frontier was clearly in the minds of jurists in Minnesota in the 1840s and 1850s,<sup>47</sup> but within two decades of statehood, that frontier

44. *Id.* at 140-41, 19 Gil. at 105-07.

45. *Fay v. New York*, 332 U.S. 261, 288 (1947).

46. Blume & Brown, *supra* note 21, at 534-35.

47. In *Tillman v. Jackson*, 1 Minn. 183, 188, 1 Gil. 157, 162 (1854), the Minnesota Territorial Supreme Court recognized that the peculiar conditions of the frontier required it to deviate from certain common law principles and rules. Wrote Territorial Justice Moses Sherburne: “The reasons for the old common law doctrine, which threw about it an odor of sanctity which had no existence in relation to personal property, lose much of their force in a new country, where land is quite as easily obtained, and quite as little regarded as any other kinds of property.” *Id.* at 189, 1 Gil. at 163. As a member of the territorial and state supreme courts and, in between, a member of the constitutional convention, Charles Flandrau would appear on any list of “founding fathers” of the state. In a 1903 memoriam to Justice Flandrau, Justice John Lovely recalled a colleague who

unwillingness to pay homage to “old laws” seems to have dissipated. In 1877, the state supreme court made a sweeping ruling:

With reference to the statute 2 Wm. & Mary, *c.* 5, which gave the right to sell a distress, (in that respect changing the common law), we agree with the supreme court of Wisconsin in *Coburn v. Harvey*, 18 Wis. 147 [1864]. It is there held, upon grounds to which we see no objection, that the common law of a state which had no political existence before the revolution, is the common law as modified and amended by the English statutes passed prior to our revolution . . . . As the statute of William & Mary was passed long before the revolution, it was held to be part of the common law of distress in Wisconsin, and, for the same reason, it is to be held to be part of the common law of Minnesota.<sup>48</sup>

The conscientious originalist seeking clues in territorial law for the meaning of a clause in Minnesota’s Constitution or the intent of its drafters faces the daunting task of identifying and weighing the influences of territorial legislation and extant court records, the Northwest Ordinance of 1787, the Organic Act of 1849, Wisconsin law, the federal Constitution, and the law of England as it existed before the Revolutionary War, but not afterward.

One way to handle the problem of deciphering territorial legal

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was decidedly non-originalist:

If Judge Flandrau had not from experience acquired those resources which only long continued study and acquaintance with the authorities will bring, he was to an eminent degree possessed of a genius for judgment, the love of right, the consciousness that law was made for man, and that the men to whom it was to be applied and adapted were around him devoted to new conditions and aspirations that could not be hampered or controlled by restrictions and limitations that had become effete and inappropriate to modern life.

Speech by Associate Justice Lovely during Proceedings in Memory of Associate Justice Flandrau (Oct. 6, 1903), *in* 89 Minn. Xxi, xxxix (1903). Justice Flandrau may have been one of those “framers” who believed that his “original intentions” should not be imposed on future jurists as they endeavored to interpret the constitution in light of “new conditions and aspirations” of the people.

48. *Dutcher v. Culver*, 24 Minn. 584, 591 (1877). Professor Blume and Ms. Brown noticed one additional incongruity raised by Dutcher’s sweeping absorption of the pre-revolutionary law of England into the common law of the new state: a Wisconsin law, passed in 1839 decreed that “none of the statutes of Great Britain” should be considered law in that jurisdiction. This law applied to the new Minnesota Territory through the Organic Act, and through the schedule, that law “remained in force” after statehood. Blume & Brown, *supra* note 21, at 508-09 (citations omitted).

history is to disregard most of it. In 1988, a divided Minnesota Supreme Court held that state law providing that a defendant charged with a misdemeanor be tried before a six-member jury violated Article 1, section 6 of the Minnesota Constitution.<sup>49</sup> In *State v. Hamm*, the majority declared:

We are convinced that, when Minnesota adopted its constitution in 1857, the drafters assumed that a jury meant a body of 12 persons. This court affirmed that belief as early as 1869. [*State v.*] *Everett*, 14 Minn. 439 (Gil 330) [(1869)]. Thus, although our constitution does not specifically spell out the number required to constitute a jury, this court has done so in its decision in *Everett*. Therefore, a 12-person jury is written into the constitution by decision of this court as if it were expressly stated in the original constitution itself.<sup>50</sup>

The court distinguished a territorial law permitting cases to be tried before a six-person jury before a justice of the peace because they could be appealed to district court for trial by a twelve-person jury.<sup>51</sup> The majority's investigation into the drafters' original "assumptions" did not lead to pre-statehood Wisconsin law, made applicable to Minnesota by the Organic Act; if they had bothered to cross the border they would have discovered the perfect precedent—*Norval v. Rice*, 2 Wis. 17 (1853), where the Wisconsin Supreme Court invalidated a state law requiring a six-member jury in trials in county court on the ground that it failed to provide twelve jurors as required by a provision in that state's constitution that was nearly identical to Article 1, section 4 of Minnesota's.<sup>52</sup> On one level, the majority in *Hamm* followed an originalist method of analysis, but their historical research into the myriad influences on the drafters of the state constitution was, to put it diplomatically, rather abbreviated. The actual, subjective views of the delegates in both "wings" of the 1857 constitutional convention on this question are not known, but it can be said with confidence that, if asked, they likely would have responded by inquiring how other state supreme courts had ruled on that question—a process we now call

49. *State v. Hamm*, 423 N.W.2d 379, 386 (Minn. 1988) (Amdahl, C.J., Simonett & Coyne, JJ., dissenting).

50. *Id.* at 382.

51. *Id.* at 383-84.

52. *Norval v. Rice*, 2 Wis. 17, 23 (1853). *Norval* was cited in *Whallon v. Bancroft*, 4 Minn. 109, 113, 4 Gil. 70, 74-75 (1860), which in turn was cited by the majority in *Hamm*, 423 N.W.2d at 383.



“horizontal federalism.”

#### IV. “HORIZONTAL FEDERALISM”

In 1857 there were thirty-two constitutions already in existence—thirty-one state constitutions and one federal—and it was against this background that the delegates in both camps conferred and compromised in St. Paul. For the originalist, understanding where the text of the constitution came from is essential to the quest for original intent or meaning. One student of state constitutions cautions that “historical research in this area will typically be of little, or no, avail.”<sup>53</sup>

First, it is necessary to understand a little bit about how the state constitutional rights provisions came into most states. For example, Minnesota’s free speech and press provision, which is similar to the Maryland one . . . derives in some measure from the Virginia Declaration of Rights of 1776 and, more importantly, from the Pennsylvania Declaration of Rights of 1790. That’s part of the essential history of the Minnesota free speech and press guarantee.

Most of the state constitutions, which are similar to each other though dissimilar to the federal Bill of Rights, are patterned after a few of the early state bills and declarations of rights, beginning with the work of George Mason in 1776. By the mid-19<sup>th</sup> century, what you have are states adopting, lock, stock and barrel, whole or nearly whole bills of rights provisions from sister states.

Understand that during the formative era in the constitutional history of most states, individual rights issues, at least as we think of them, were not burning issues. The “hot” rights issues consisted of things such as water rights, mining rights and laws governing “Pinkerton soldiers.” Beyond that, the central focus of the state constitutional conventions had to do with structural governmental issues. Consequently, when it came to bills of rights matters, the general tendency was to “borrow or steal” from a neighboring state. In this sense, at the state level there were no “framers” or “drafters” or even “founders.” There were only “borrowers.” Moreover, little, if any commentary accompanied many of these

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53. Ronald K. L. Collins, *Litigating State Constitutional Issues: The Government’s Case*, 1 EMERGING ISSUES IN STATE CONST. L. 201, 204-05 (1988) (citations omitted).

duplicative efforts. What this means is that there will be little or no evidence of “original intent” when it comes to typical bail, search and seizure, self-incrimination, free speech, freedom of religion, and equality provisions.<sup>54</sup>

The delegates to the Minnesota constitutional convention were not novel political thinkers, but practical partisans who united only to achieve their goal of gaining statehood as quickly as possible. They consulted and copied other state charters when fashioning the text of Minnesota's. According to William Anderson and Albert J. Lobb, authors of the standard history of the formation of Minnesota's constitution, there were multiple sources for the text:

It may be said, however, that the Minnesota bill of rights closely resembles that in the Wisconsin constitution (1848). Among the chief general sources of the constitution not to mention the remote Magna Charta and other famous English liberty documents, may be listed the Northwest Ordinance, the federal constitution, the organic act, the enabling act, the Iowa constitution (1846), the Wisconsin constitution (1848), the New York constitution (1846) and the contemporary constitutions of Illinois, Indiana, Michigan, and Ohio. Practically all of these were mentioned at one time or another in the debates, and some of them frequently.<sup>55</sup>

It follows that if courts wish to fathom the original understanding of certain provisions of Minnesota's constitution, they must turn to the texts of *other* constitutions, which had their own drafters, ratifiers, judicial interpreters, and unique histories. As is obvious by now, the path of the state constitutional originalist is not short and straight.

“Horizontal federalism”—the practice of a state supreme court looking at how the highest courts of sister states have addressed a particular constitutional problem—is one more reason why strict originalism has never taken firm root in the constitutional jurisprudence of the states.<sup>56</sup> From its earliest days, the Minnesota

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54. *Id.*

55. WILLIAM ANDERSON & ALBERT J. LOBB, A HISTORY OF THE CONSTITUTION OF MINNESOTA 131 (1921); *cf.* State v. Hershberger (II), 462 N.W.2d 393, 399 (Minn. 1990) (Simonett, J. concurring).

56. The phrase “horizontal federalism” was coined by Mary Cornelia Porter and G. Alan Tarr in their “Introduction” to STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM, at xxi-xxii (1982); *see also* Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 992 (1985) (“To the extent that state courts

Supreme Court has engaged in horizontal federalism. For the proposition that the jury guarantee of Article 1, section 4 “is intended to continue, unimpaired and inviolate, the right to trial by jury as it existed in the Territory of Minnesota when our constitution was adopted in 1857,” the supreme court in *Abraham* relied upon the 1860 case of *Whallon v. Bancroft*.<sup>57</sup> Here is how Justice Flandrau explained the purpose of Article 1, section 4 in *Whallon*:

The effect of this clause in the Constitution is, *first*, to recognize the right of trial by jury as it existed in the Territory of Minnesota at the time of the adoption of the State Constitution; and *second*, to continue such right unimpaired and inviolate. It neither takes from or adds to the right as it previously existed, but adopts it unchanged. Wherever the right of trial by jury could be had under the territorial laws it may now be had, and the Legislature cannot abridge it; and those cases which were triable by the Court without the intervention of a jury, may still be so tried.<sup>58</sup>

Flandrau cited no authority for this pronouncement. He did not refer to the two constitutional caucuses (though he did in other cases) nor any territorial records and practices (though he did in other cases).<sup>59</sup> Instead, in the next three paragraphs of the

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depart from federal analysis, it becomes increasingly important for the courts to communicate with each other about significant decisions affecting fundamental rights. Horizontal federalism, a federalism in which states look to each other for guidance, may be the hallmark of the rest of the century.”). Pollock was associate justice of the New Jersey Supreme Court. In her annotated study of the Minnesota constitution, Professor Morrison notes that reliance upon the rulings of other state courts is one of the canons of the Minnesota Supreme Court’s interpretative methodology. “When there is some ambiguity, however, most courts will consult the history of the adoption of the clause, sometimes including histories of similar clauses in other jurisdictions.” MORRISON, *supra* note 25, at 14.

57. *Abraham v. County of Hennepin*, 639 N.W.2d 342, 348 (Minn. 2002) (citing *Whallon v. Bancroft*, 4 Minn. 109, 111, 4 Gil. 70, 74 (Minn. 1860)). This is the statement Professor Pannier asserts embodies an originalist approach to adjudication. Pannier, *supra* note 2, at 272. The court also cited *Olson v. Synergistic Technologies Business Systems, Inc.*, 628 N.W.2d 142 (Minn. 2001), but *Olson* cited only *Whallon* for the conclusion that Article 1, section 4 was intended to continue the right to trial by jury that previously existed in the Territory of Minnesota. 628 N.W.2d at 148-49. *Olson* held that promissory estoppel actions, being equitable in nature, are not actions at law within the meaning of Article 1, section 4, and thus not entitled to be jury-tried. *Id.*

58. *Whallon*, 4 Minn. at 111, 4 Gil. at 74 (emphasis in original).

59. Speaking for a unanimous court, in *Board of Supervisors of Ramsey County v. Heenan*, 2 Minn. 330, 335-36, 2 Gil. 281, 287 (1858), a case involving the scope of

opinion, he cited rulings of the highest courts of Wisconsin, Illinois, and Ohio, and to the predominance of "article seven" of the United States Constitution on the conduct of jury trials in the former territory.<sup>60</sup> If there was evidence that any member of the 1857 convention relied upon these authorities when debating and drafting Article 1, section 4, Justice Flandrau, an active member of the Democratic wing, did not cite that source.

Professor Stefan Riesenfeld, who made several forays into the virgin forests of territorial legal history while on the faculty of the University of Minnesota Law School in the 1940s, once observed that it requires "much ingenuity and real patience" to locate the sources of territorial law.<sup>61</sup> His words are equally applicable to

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the constitutional prohibition against legislation embracing more than one subject matter not expressed in its title, Justice Flandrau first referred to the Democratic constitutional wing "presided over by Governor Sibley," and then to the Republican wing "presided over by Mr. Balcombe." He then reviewed abuses by the territorial legislature, bluntly concluding, "The [new legislative] system is thorough, and means to secure to the people fair and intelligible legislation, free from all the tricks and *finesse* which have heretofore disgraced it." *Id.* at 336-37, 2 Gil. at 287-88. Three years later, Justice Flandrau declared legislation permitting voters in a county to change the county seat in violation of Article 11, section 1 [now Article 12, section 3] of the constitution. The purpose of this article was to "check" the previous "abuses" of the territorial legislature, which he described in detail.

During the territorial existence of Minnesota, a very great evil had grown up in the legislation of the country, consequent upon the feverish excitement that prevailed for the creation of towns and cities, and the speculation in lots and lands. It was the constant practice of the legislature to change county lines, and the county seats of counties from one town to another, at the solicitation of interested parties, without a full understanding of the wishes and interests of the people of the counties affected.

*Roos v. State ex rel. Swenson*, 6 Minn. 428, 434-35, 6 Gil. 291, 293-94 (Minn. 1861). He cited both wings of the constitutional convention in support of his conclusion. *Id.* There is nothing approaching this depth of analysis of primary sources in his declaration of the purposes of Article 1, section 4 in *Whallon*.

60. 4 Minn. at 111-12, 4 Gil. at 74-76. Fifteen years later, in *Board of Commissioners of Mille Lacs County v. Morrison*, 22 Minn. 178 (1875), Chief Justice James Gilfillan added Vermont to the list of authorities, stating that the provision on jury trials in the constitution of that state, "though differently expressed, is substantially the same as the provision in the constitution of this state." *Id.* at 181-82. He then cited a decision of the Vermont Supreme Court on classes of cases that were intended to be jury-tried. *Id.* at 182. Before turning to Vermont's highest court for guidance, the chief justice quoted Justice Flandrau's commentary in *Whallon*. *Id.* at 181.

61. Riesenfeld, *supra* note 31, at 140-41 (1949) ("In some instances the first revision of a new territory varied but little from the last revision of the old from which it was derived, in other instances radical departures occurred. In these latter cases the revisors frequently relied heavily upon the statutes of some other

those jurists, scholars, and lawyers who attempt to divine the original meaning or the true intent of the framers of an article in the state constitution. Justice Flandrau's comments in *Whallon* about the purpose of Article 1, section 4 of the Minnesota Constitution have been cited and paraphrased in most every supreme court decision interpreting this article since 1860, but on close inspection they reflect more horizontal federalism than strict originalism at work.

Tracing what happened to Justice Flandrau's foreign authorities reveals still another reason why originalism has never made much headway in state constitutional law—the growth of native precedent. *Abraham* cited *Whallon*, not the authorities cited in *Whallon*. If the supreme court in *Abraham* had cited “Norval v. Rice, 2 Wis. 22” or “14 Ill. 171” or “2 Ohio St. 296” rather than *Whallon*, the lower courts would have been astonished, and the bar utterly baffled. *Whallon*'s authorities disappear over time, and this is the result of more than a mere change in juristic opinion style. Through citation studies, legal historians have learned that it took some time before supreme courts in newly formed states in nineteenth century America began to cite their own decisions more often than those from other jurisdictions. In other words, it took time for a state supreme court to build a body of its own precedent it could cite even though that precedent may have relied initially upon the rulings of other state supreme courts. In Minnesota, this phenomenon appears to have taken about a generation.<sup>62</sup> All of this emerges in *Abraham* where the Minnesota Supreme Court cited its own decisions for the purpose of Article 1, section 4, rather than examine with “much ingenuity and real patience” original records and primary sources. Thus the growth of the supreme court's own

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states, and it may sometimes require much ingenuity and real patience to ascertain the source from which the compilers borrowed.”). For a case study of how this process of borrowing helped form Minnesota's garnishment laws, see William E. Mussman & Stefan A. Riesenfeld, *Garnishment and Bankruptcy*, 27 MINN. L. REV. 1, 47-50 (1942).

62. Of all citations during its first eight years, from 1858 to 1865, the Minnesota Supreme Court cited New York law 41%, England 14%, other state courts 13%, and its own decisions only 15% of the time. Schochet, *supra* note 35, at 110-12. Of the total citations during the thirty-year period from 1870 to 1900, 46% were to out-of-state courts (i.e., other state courts, federal courts, and foreign courts). See Lawrence M. Friedman et al., *State Supreme Court: A Century of Style and Citations*, 33 STANFORD L. REV. 773, 801-04 (1981). For the period from 1905 to 1935, the percentage rose to 50%, and from 1940 to 1970, it declined to 35%. *Id.* at 802 (the authors studied sixteen state supreme courts, including Minnesota's).

precedents and its practice of self-citation have formed an increasingly thick layer between it and primary sources such as territorial practices and records, which, to the originalist, may reveal the original understanding of a particular constitutional guarantee.

#### V. "LAW OFFICE HISTORY"

Most of the literature espousing or refuting originalism is directed to its use by the United States Supreme Court, very little to state supreme courts. Indeed, the imbalance is so great that the suspicion begins to arise that originalism, regardless of its merits, may be a peculiarly federal phenomenon. While narrow case notes abound, it is striking how little has been written about the Minnesota Supreme Court's more general methods of constitutional adjudication.

State appellate judges are appointed for many reasons but not because they hold firm beliefs on state constitutional law. Not many—and this may be a good thing—assume a seat on the supreme court having already developed unified theories of the place of a state supreme court in a federalist democracy or how to interpret the state constitution. When their interpretative skills are called upon, it usually is to construe legislation, rarely the constitution.<sup>63</sup> Justice Christine M. Durham of the Utah Supreme Court once described these limitations:

[F]ar too many state judges continue to be disadvantaged in articulating coherent principles of law involving their own constitution.

Force of habit and overcrowded dockets have more than a little to do with the reluctance of some state appellate courts to develop a comprehensive judicial philosophy regarding state constitutional doctrines. Another cause of the problem is the failure of creative lawyering.

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63. Historians of the behavior of state supreme courts have noted that those having greater discretion over their dockets (i.e., less mandatory review) decide more constitutional cases than those that do not. The reason is that constitutional claims are perceived to be more interesting, challenging, and important. See Robert A. Kagan et al., *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961, 987-90 (1978) (the authors studied sixteen state supreme courts, including Minnesota's). The Minnesota Supreme Court gained more control over its docket in 1982 when Article 6, sections 1 and 2, of the constitution were amended, creating the court of appeals.

Despite the growing body of scholarship and case law in the area of state constitutional construction, it is still true that most state courts have little to guide their interpretation of the state constitution than a body of state case law dependent primarily on the U.S. Constitution. In other words, most of us on state appellate courts must start from scratch in understanding and explaining the significance of individual rights under our state constitutions. Not only do we lack precedent in our jurisdictions but also we frequently encounter a disturbing absent mindedness on the part of litigants and lawyers who frame constitutional issues for disposition.<sup>64</sup>

That “disturbing absent mindedness” Justice Durham saw was not confined to her court. Several state supreme courts, perhaps exasperated with lawyers who asserted state constitutional claims but provided little historical or analytical support, listed interpretative factors or criteria that should be briefed to aid them. The intent of the framers appears fleetingly in only one.<sup>65</sup>

If such a homework assignment were given to lawyers who base an appeal on the original meaning or original intent of the framers of a provision of the state constitution, it is doubtful that many would receive passing grades. Lawyers are advisers and advocates, counselors and confidants, not disinterested historians specially trained to sift patiently through, weigh and interpret ambiguous primary source materials and to place an event in a larger social, political or economic context. “Law office history”—that scornful epithet heaped by the late Paul Murphy and other professional historians upon lawyers’ use of history in their advocacy of a client’s

64. Christine M. Durham, *Filing a Scholarly Void*, THE NAT’L L.J., Sept. 19, 1986, at S-6.

65. *State v. Williams*, 459 A.2d 641, 650 (N.J. 1983) (citing *State v. Hunt*, 450 A.2d 952, 965-66 (N.J. 1982) (Handler, J. concurring)) (“We have not hesitated to recognize and vindicate individual rights under the State Constitution where our own constitutional history, legal traditions, strong public policy and special state conditions warrant such action.”). To determine whether broader rights should be extended under their state constitution than the federal, the Washington Supreme Court listed six “non-exclusive” criteria in *State v. Gunwall*, 720 P.2d 808, 812-13 (Wash. 1986): (1) the textual language of the state constitution, (2) differences in the texts of parallel provisions of the federal and state constitutions, (3) constitutional history, (4) preexisting state law, (5) structural differences, and (6) matters of particular or local concern. These cases suggest the real place of original intent or meaning in the lexicon of considerations of state supreme courts when they interpret the bills of rights in their state charters: it is not an exclusive methodology; rather, it is only one factor among many, and a minor one at that.

cause—is inherently unreliable.<sup>66</sup> A prized skill of an appellate lawyer is how to use effectively the forty-five pages permitted for an appellate brief due in thirty days. Very few would allot a portion of that precious space to an argument based on records of the territorial government of the 1850s, or a Wisconsin law that predated the 1857 constitution. For all of these reasons, practicing lawyers are ill-equipped to competently brief the supreme court on the original understanding or the original intent of the drafters of a particular article of the state constitution.

## VI. THE “NEW JUDICIAL FEDERALISM”

As reincarnated in the 1970s, originalism was a reaction against the Warren Court.<sup>67</sup> For many of its proponents, originalism's great strength is that it limits judicial activism—by strictly adhering to the original intent of the framers of the constitution, federal judges are restrained from imposing their own values onto the citizenry through the guise of constitutional interpretation.<sup>68</sup> On the state court level, which is the focus of this essay, originalism has had to contend with a powerful countervailing intellectual current which sought to perpetuate, or at least not retreat from, the Warren Court's protection of individual rights and civil liberties, albeit in a different forum. In the 1970s, as more conservative jurists were appointed to the

66. Paul L. Murphy, *Time to Reclaim: The Current Challenge of American Constitutional History*, 69 AM. HIST. REV. 64, 77 (1963) (quoting Howard J. Graham). If lawyers lack the training and discipline of professional historians, judges do as well. Knowing that historians may spend years laboriously researching an aspect of constitutional history before submitting a paper for publication, many state court judges, already engulfed in complex cases requiring rulings within a few months, would be reluctant to issue an opinion based on a hurried inquiry into original understanding or intent. Even Professor Richard S. Kay, a staunch proponent of originalism, admits it is easier said than done:

Adherence to the original intentions is neither theoretically impossible nor so practically difficult that attempts at it are futile. This is not to say that it will always be an obvious or easy technique. Sometimes it will be easy, but in many cases it will require an intense, thorough and sensitive assimilation of much historical information.

Richard S. Kay, *Adherence to Original Intent in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 257 (1988) (citations omitted).

67. HERMAN BELZ, A LIVING CONSTITUTION OR FUNDAMENTAL LAW? 221-72 (1998) (sketching history of originalism and its critics from the mid-1970s to the early 1990s).

68. Pannier, *supra* note 2, at 266; Kay, *supra* note 66, at 288 (contending that originalism “constrains” judges more than any other “alternative method of interpretation”).



United States Supreme Court and the lower federal courts, some judges, many scholars, and a few practicing lawyers resurrected the notion that state supreme courts should interpret their state charters to recognize individual rights and freedoms that were greater than those under the federal constitution, thereby supposedly preserving the state's historic function as a first-line guarantor of individual rights.<sup>69</sup> This movement has been called the "new judicial federalism."<sup>70</sup> In its original ambitions, it was the antithesis of originalism.

This movement was encouraged by the United States Supreme Court's ruling in 1983 in *Michigan v. Long* that it would not accept review of an appeal from a state court that clearly and unambiguously rested its ruling on state law.<sup>71</sup> To avoid federal review, a state supreme court need only make a "plain statement" that it cited federal law just as "guidance" or indicate that there was a "separate, adequate and independent" ground in state law for its

69. *Friedman v. Comm'r of Public Safety*, 473 N.W.2d 828, 830 (Minn. 1991) (Yetka, J.) ("In recent years, as the United States Supreme Court has retrenched on Bill of Rights issues, state courts have begun to interpret expansively the rights guaranteed under their own constitutions."). The belief that "[s]tate courts are, and should be, the first line of defense for individual liberties within the federalist system" was affirmed by Justice C. Donald Peterson in *State v. Fuller*, 374 N.W.2d 722, 726 (Minn. 1985).

70. The literature on the new judicial federalism is vast. G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1097 n.3 (1997). For an argument that the Minnesota Supreme Court should view the state Bill of Rights as "a dynamic document, open to innovative interpretation and expansion," see Terrence J. Fleming & Jack Nordby, *The Minnesota Bill of Rights: "Wrapt in the Old Miasmal Mist,"* 7 HAMLINE L. REV. 51, 77 (1984), noted in *State v. Fuller*, 374 N.W.2d at 726 n.1, and *Friedman v. Comm'r of Public Safety*, 473 N.W.2d at 830. The authors devote only two paragraphs bolstered by several long footnotes to the history of the Minnesota Constitution. *Id.* at 70-72. For a more cautious approach to the growth of an independent body of Minnesota constitutional law, see Lisa M. Wiencke, Note, *Invoking the State Constitution to Invalidate Legislation: Who's Guarding the Guardians?*, 18 WM. MITCHELL L. REV. 1073 (1992). The author devotes one short paragraph to the history of the Minnesota Constitution. *Id.* at 1106. See also Melissa Sheridan & Bradford S. Delapena, *Individual Liberties Claims: Promoting a Healthy Constitution for Minnesota*, 19 WM. MITCHELL L. REV. 683 (1993) (urging criminal defense counsel to use the state constitution as a shield at trial and on appeal). As might be expected, there was a fierce counterattack to the new judicial federalism by those who wanted to prevent replication by state supreme courts of what they considered to be the abuses of the Warren Court. See, e.g., Steven J. Twist & Mark Edward Hessinger, *New Judicial Federalism: Where Law Ends and Tyranny Begins*, 3 EMERGING ISSUES IN STATE CONST. L. 173 (1990); Earl M. Maltz, *The Political Dynamic of the "New Judicial Federalism,"* 2 EMERGING ISSUES IN STATE CONST. L. 233 (1989).

71. 463 U.S. 1032 (1983).

decision.<sup>72</sup> To many observers, *Long* encouraged state supreme courts to reexamine and reinterpret their own state constitutions, particularly their bills of rights. This coincided with the activist agenda of the new judicial federalists, but not originalism. In recent times, though the revivalist fervor of the new judicial federalism has diminished, its attractiveness to state supreme courts has not.

Not surprisingly, all state supreme courts do not construe articles in their state bills of rights that parallel federal guarantees in the same way. Models have been developed by scholars and some jurists to determine when a state court should rely on the bill of rights in its constitution to protect individual liberties and, if it does, how it should treat federal precedent.<sup>73</sup> A critical element of

72. *Id.* at 1041.

73. Robert F. Utter, *Ensuring Principled Development of State Constitutional Law: Responsibilities for Attorneys and Courts*, 1 EMERGING ISSUES IN STATE CONST. L. 217, 222-24 (1988); Linda B. Matarese, *Other Voices: The Role of Justices Durham, Kaye, and Abrahamson in Shaping the "New Judicial Federalism,"* 2 EMERGING ISSUES IN STATE CONST. L. 239, 246-52 (1989); John M. Devlin, *State Constitutional Autonomy Rights in An Age of Federal Retrenchment: Some Thoughts on the Interpretation of State Rights Derived from Federal Sources*, 3 EMERGING ISSUES IN STATE CONST. L. 195, 233-45 (1990); Rita Coyle DeMeules, *Minnesota's Variable Approach to State Constitutional Claims*, 17 WM. MITCHELL L. REV. 163 (1991). At one end of the spectrum of state court adjudication is the "lockstep" model. Under it, state courts mechanically follow the United States Supreme Court's interpretations of federal guarantees when they interpret their own constitutions. The lockstep model requires state courts to closely monitor developments on the federal landscape; if they miss a change in direction, they fall off the beaten path. Under the "interstitial" or "supplemental" model, the state supreme court first looks to see if the constitutional claim can be decided under federal law, and only if that fails does it look to the state constitution. A third model is the "dual sovereignty" or "dual reliance" approach. Under it, the constitutional claim is analyzed by the state supreme court under the federal and state constitutions, but it rests its ruling on both. At the other end of the spectrum is the "primacy" approach under which a state supreme court initially addresses the claim under the state constitution, which is viewed as an independent source of rights. If the state constitution protects the litigant's rights, the court will not analyze the issue under the federal constitution; and if the state charter does not protect the person's rights, the court decides the issue under federal constitutional law. Of the four, the primacy model is most receptive to an originalist methodology, but even under it, original intent is only one factor a state supreme court weighs when determining whether its constitution protects a claimant. The reality of trial practice reveals the artificiality in these four models. State supreme courts are almost always reactive bodies—that is, they respond to the claims that are appealed and briefed. Lawyers, believing that two claims are better than one, take advantage of Rule 8 of the Rules of Civil Procedure, which permits alternative pleading. Thus, they bring parallel state and federal constitutional claims arising from the same facts (i.e., one alleging denial of due process under the Fourteenth Amendment, another under Article 1,

each of these models is federal constitutional law. For its part, the Minnesota Supreme Court has stated that it considers decisions of the United States Supreme Court on comparable or parallel provisions of the federal Bill of Rights to be “of inherently persuasive, although not necessarily compelling, force.”<sup>74</sup> Even in *Abraham*, the Minnesota Supreme Court footnoted a method of analysis of the guarantee of a jury trial in the Seventh Amendment formulated by the United States Supreme Court that was similar to its own.<sup>75</sup> The reality is that the United States Supreme Court

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section 7 of the state constitution). On appeal the state supreme court is pressed to analyze both claims in the same way. See, e.g., DeMeules, *supra*, at 181-82.

74. *Fuller*, 374 N.W.2d at 727; *State v. Harris*, 590 N.W.2d 90, 97 (Minn. 1999). When a particular guarantee of the state constitution has no federal counterpart (as for example, the “certainty of remedy” guarantee in Article 1, section 8), there is no federal authority to be considered. Political scientist Wallace Mendelson has described what happens when the Minnesota Supreme Court endeavors to follow U.S. Supreme Court constitutional rulings, but does not keep up with recent developments. In *Federal Power Communications v. Hope Natural Gas Co.*, 320 U.S. 591, 605 (1944), and *Federal Power Communications v. Natural Gas Pipeline*, 315 U.S. 575, 606 (1942), the Supreme Court rejected the “fair value” approach to utility rate-making adopted in *Smyth v. Ames*, 169 U.S. 466, 546 (1898). Five years after *Hope*, however, in *In re Applications to Fix Streetcar Rates of Fare* (Application of Minneapolis Street Railway), 228 Minn. 435, 441 37 N.W.2d 533, 536-37 (1949), the Minnesota Supreme Court continued to apply the *Smyth* formula. “There is not the slightest indication that the Minnesota Supreme Court had ever heard of either *Pipeline* or *Hope*,” Professor Mendelson wrote in *Smyth v. Ames in State Courts, 1942-1952*, 37 MINN. L. REV. 159, 163 (1953). The Minnesota Supreme Court finally embraced *Pipeline* and *Hope* in *Minneapolis Street Railway Co. v. City of Minneapolis*, 251 Minn. 43, 66-72, 86 N.W.2d 657, 673-76 (1957).

75. 639 N.W.2d at 353 n.17. In 1974, the Supreme Court held that the Seventh Amendment applied to “actions enforcing statutory rights,” and the same year it held that the “Amendment requires trial by jury in actions unheard of at common law.” *Curtis v. Loether*, 415 U.S. 189, 193-94 (1974); *Pernell v. Southall Realty*, 416 U.S. 363, 375 (1974). Later, in the 1980s and early 1990s, the Court issued a battery of rulings applying the Seventh Amendment to statutory claims that are “analogous” to common law claims that were jury-tried in pre-revolutionary England, but it emphasized that the nature of the relief sought by the claimant was the controlling test. *Tull v. United States*, 481 U.S. 412, 420-21 (1987) (while holding a real estate developer was entitled to a jury trial on the issue of liability for civil penalties under the Clean Water Act, the court wrote: “We reiterate our previously expressed view that characterizing the relief sought is ‘[m]ore important’ than finding a precisely analogous common-law cause of action in determining whether the Seventh Amendment guarantees a jury trial.”); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989) (“[T]he Seventh Amendment also applies to actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century as opposed to those customarily heard by courts of equity or admiralty.”); *Chauffeurs, Teamsters, and Helpers Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990) (duty of fair representation claim for money damages against

throws a long shadow over state supreme courts' willingness and ability to interpret their own bills of rights independent of federal law. Indeed, the federal constitution, as construed by the Supreme Court, is probably the single greatest obstacle to a strict originalist methodology ever gaining a firm foothold in state constitutional law.

### VII. ABRAHAM

In *Abraham*, the Minnesota Supreme Court held that the jury guarantee of Article 1, section 4 of the state constitution applies to statutory claims that seek money damages and that are of "the same type of action for which a jury trial existed when the Minnesota constitution was adopted, any cause of action at law."<sup>76</sup> Justice Russell Anderson, the author of the opinion, confined his textual analysis to maintaining the distinction between court-tried equitable claims and jury-tried legal claims, but emphasized that the standards for determining what are "cases at law" are those of the twenty-first century, not the nineteenth.<sup>77</sup> He did not mention the state's convoluted territorial heritage, expressed no interest in the original intent of the framers of the 1857 constitution, and restricted his historical analysis to rapidly sketching the development of the law of wrongful dismissal in Minnesota and elsewhere since 1860. So much is missing, and we may ask why he crafted the opinion in this way. Clearly he believes, as all judges do, that history illuminates the present, but he also may think that too much history clouds it.<sup>78</sup> At the center of the court's methodology

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union triable by jury); *Wooddell v. Int'l Bhd. of Elec. Workers, Local 71*, 502 U. S. 93, 98 (1991) (union member entitled to jury trial in a reprisal action under the Labor Management Reporting and Disclosure Act). By the time *Abraham* appeared on its docket, the Minnesota Supreme Court already had developed a variation of the United State Supreme Court's methodology. See *Tyroll v. Private Label Chem., Inc.*, 505 N.W.2d 54, 57 (Minn. 1993) (holding that a statute authorized claim for subrogation in a workers' compensation act claim was a "tort action" requiring trial by jury); *Olson v. Synergistic Technologies Bus. Sys., Inc.*, 628 N.W.2d at 149 (holding that Article 1, section 4 applies to the "type of action" that existed in territorial days).

76. 639 N.W.2d at 349, 353-54. This appears to be the "general rule" among the state courts. See 47 AM. JUR. 2d *Jury* § 18 at 725 (1995) (citing *Tyroll*, 505 N.W.2d at 54).

77. 639 N.W.2d at 350 ("The nature of the employment relationship at the time the constitution was adopted is immaterial to a determination of whether a claim for retaliatory discharge *today* is a cause of action at law, and thus carries an attendant constitutional right to jury trial.") (emphasis in original).

78. Cf. Edward C. Stringer, *Foreword—"May It Please the Court,"* 29 WM.

was a transparently non-originalist test: is a statutory claim seeking only money damages a cause of action at law by today's standards?

In his essay, Professor Pannier sounds an alarm: "I suggest the problem is this test can apparently be used to prove that *any* statutory cause of action carries with it a constitutional right to a jury trial."<sup>79</sup> For many, originalist and non-originalist alike, this is not a problem—it is a virtue. Trial by jury is widely perceived to be a keystone of democracy. In *State v. Hamm*, where a majority of the court held that the state constitution barred a jury of fewer than twelve in criminal cases, Justice Lawrence Yetka wrote:

Each and every one of the protections set out in the Bill of Rights in the United States and Minnesota Constitutions is important, but two of those are the keystones to which all of the other rights are anchored; they are the right to counsel and the right to trial by an impartial jury. Without the right to a fair and impartial trial by one's peers, all the other rights could become meaningless.<sup>80</sup>

This rhetorical flourish is absent from the court's opinion in *Abraham*, and again we may ask why. Most obviously *Abraham* is a civil case, and though it involved allegations of retaliation by a powerful governmental unit, it was not a criminal prosecution of political dissidents. And the justices surely were aware that most civil cases are settled or dismissed, and few tried to juries.<sup>81</sup> There may have been another reason as well. If the court declared the right to trial by jury to be the constitutional pedestal on which all other civil rights and liberties rest, that would have detracted from and even diminished its broader vision of the state constitution as an evolving charter, one designed to be interpreted to meet the needs of each generation—in this case, a need of the those residing in the age of statutes. Whatever else may be said of *Abraham*, it was not, as Professor Pannier charges, "internally inconsistent" and it

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MITCHELL L. REV. 263, 263 (2002) ("Crafting the opinion begins to feel like how an artist or a composer must feel in approaching a new creation—that it must clearly and fully express the point being made without saying too much, that the parts must interrelate, and that it must have enduring meaning."); Benjamin N. Cardozo, *Law and Literature*, in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 339, 341 (Margaret E. Hall ed. 1947) ("There is an accuracy that defeats itself by the overemphasis of details. I often say that one must permit oneself, and that quite advisedly and deliberately, a certain margin of misstatement.").

79. Pannier, *supra* note 2, at 288 (emphasis in original).

80. *State v. Hamm*, 423 N.W.2d 379, 385 (Minn. 1988).

81. David Abraham and Scott Lennander, the plaintiffs in *Abraham*, settled their cases against the county after remand but before their scheduled jury trial.

does not have “the appearance of logical incoherence.”<sup>82</sup> Indeed, many will say that in its clarity and boldness, in what was said and what was not, *Abraham* is an enduring contribution to the constitutional law of the state.

### VIII. THE EVOLVING MINNESOTA CONSTITUTION

Professor Pannier states that the supreme court in *Abraham* was so obviously non-originalist it “might well have quoted Justice William Brennan’s well-known remarks” on the “living” constitution, which he proceeds to do.<sup>83</sup> But the court could look much closer to home if it wanted an endorsement of that view of the Minnesota Constitution. In 1889, Justice William Mitchell, a towering figure in the legal history of the state, discussed what constituted “a certain remedy” guaranteed by Article 1, section 8 of the state constitution:

Again, it must be remembered that what constitutes . . . “a certain remedy” is not determined by any inflexible rule found in the constitution, but is subject to variation and modification, as the state of society changes. Hence a wide latitude must, of necessity, be given to the legislature in determining both the form and the measure of the remedy for a wrong.<sup>84</sup>

Many of Justice Mitchell’s predecessors and successors have shared this vision of the constitution. In the midst of the Great Depression, the state supreme court upheld the constitutionality of the Mortgage Moratorium Act, rejecting a challenge that it impaired the obligations of the mortgage contract. Concurring Chief Justice Samuel Wilson wrote, “There has always been a development in judicial construction to meet new and changing conditions . . . .”<sup>85</sup> Even in *State v. Hamm*, Justice Yetka acknowledged the evolutionary nature of the state constitution: “The constitution, by its broad and generous language, allows for such significant changes to be considered by courts in interpreting its terms . . . . However, unless significant changes in society or constitutional amendments require another reading, the essential

82. Pannier, *supra* note 2, at 285-86.

83. *Id.* at 283.

84. *Allen v. Pioneer Press Co.*, 40 Minn. 117, 123, 41 N.W. 936, 938 (1889).

85. *Blaisdell v. Home Bldg. & Loan Assn.*, 189 Minn. 422, 435, 249 N.W.2d 334, 339 (1933), *aff’d* 290 U.S. 398 (1934).

protections guaranteed by the constitution must be retained.”<sup>86</sup> In an introduction to a symposium on the Minnesota Constitution in the *William Mitchell Law Review* in 1994, Justice Simonett dismissed originalism with a swift bang of his gavel: “‘Original intent’ is not a particularly helpful approach.”<sup>87</sup> And in *Abraham* itself, Justice Anderson penned an aphorism worthy of Justice Holmes, one destined to be quoted in the opinions of future generations of justices: “The constitution is not frozen in time in 1857, incapable of application to the law as it evolves.”<sup>88</sup> There is a distinct strain of non-originalist thinking<sup>89</sup> by state supreme court justices serving during all periods of the court’s history that poses still another hurdle to the originalist who seeks to persuade it to adopt this idealized methodology to state constitutional adjudication.

## IX. CONCLUSION

Professor Pannier concludes his essay by advising the supreme court to choose explicitly between originalist and non-originalist “formulations of constitutional issues.”<sup>90</sup> There is evidence,

86. 423 N.W.2d 379, 385 (Minn. 1988). In dissent, Chief Justice Douglas Amdahl was more emphatic: “Our state constitution, like the United States Constitution, was intentionally written in broad and general terms to allow for change as society changes. It is not enough to recognize an original intent of the 1857 framers and say that 12 was intended for all time.” *Id.* at 389.

87. John E. Simonett, *An Introduction to Essays on the Minnesota Constitution*, 20 WM. MITCHELL L. REV. 227, 239 (1994).

88. 639 N.W.2d 342, 349 (Minn. 2002).

89. In his essay, Pannier summarizes the “non-originalist” approach to constitutional interpretation:

[I]t is legitimate, and perhaps even necessary, for judges interpreting a written constitution to invoke principles and norms from sources which have nothing to do with the language of the original document, the historical intentions motivating that language, the implicit structure presupposed by the document, or the document’s historical context . . . . [N]on-originalist sources . . . might include a great variety of items, e.g., current systematic political philosophies (e.g., John Rawls), ideologies of current political parties, prevailing attitudes in society, personal ideologies of judges, and so forth.

Pannier, *supra* note 2, at 266 (citations omitted).

90. *Id.* at 293. At the conclusion of his essay, Professor Pannier suggests that the supreme court should have posed the following question in *Abraham*: “Does the jury-trial provision of the Minnesota Constitution, as intended by its framers in 1857, require jury trials for claims brought under the Whistleblower Act?” *Id.* Had it done so, he states, its methodology would be “transparent,” and that is good for democracy. There may be many reasons why the supreme court did not ask this question, one being that the justices were familiar with Professor Pannier’s 1992 article in these pages in which he skewered on highly theoretical grounds the

however, that the court has already made that choice: it has been, is today, and always will be non-originalist. But we too shall end with advice to the court. On those occasions when it is asked to narrowly construe a rights guarantee in an article of the Minnesota Constitution to accord with its supposed original meaning or the intent of the framers—when, in other words, it is called upon to venture into the quicksands of originalism—the court may reflect upon the lyrical prose of Professor Pannier himself:

[The framers] succeed, at best, only in launching vessels of words down the river of history. What those vessels will be filled with by later interpreters is beyond [their] control.<sup>91</sup>

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originalist approach to statutory and constitutional interpretation, and lampooned the notion that a judge can figure out what a legislator might have thought about something she didn't actually think about—as for example what the “framers” of the Minnesota Constitution would have thought about a piece of workplace legislation passed 130 years after they held their dual conventions. Russell Pannier, *An Analysis of the Theory of Original Intent*, 18 WM. MITCHELL L. REV. 695, 722 (1992).

91. Pannier, *supra* note 90, at 728.